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No. 08-328

In The Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZEMA TIRADO, AND THE CITY OF NEW HAVEN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FRANK RICCI, *ET AL.*

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, FRANK RICCI, *ET AL.*

Mountain States Legal foundation ("MSLF") respectfully submits this amicus curiae brief on behalf of itself and its members in support of Petitioners, Frank Ricci, *et al*.[1]

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with more than 9,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has been involved particularly in the area of individual liberties and civil rights, having been counsel for plaintiffs in every phase of the proceedings in *Adarand Constructors, Inc*.,[2] *Concrete Works of*

[1] Pursuant to Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Colorado,[3] *Wygant v. Jackson Board of Education*,[4] and on the petition for certiorari for *Sherbrooke Turf, Inc*.[5] In addition, MSLF has participated in a number of other cases challenging the constitutionality of government-sponsored racial preference programs. MSLF has been dedicated for over twenty-five years to litigating for the equality of all persons, regardless of race, and to applying the same standard of judicial review to all governmental racial classifications – strict scrutiny. MSLF is, therefore, well qualified to comment on the issues now before this Court.

ARGUMENT

I. INTRODUCTION.[6]

The Civil Service Board ("CSB") of New Haven, Connecticut, under pressure from New Haven's Mayor and City Attorney, refused, by a vote of 2-2 with one abstention, to certify the results of a civil service promotional exam. The exam, which is mandated by the City's Charter and is designed to base all

[3] *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[5] *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 541 U.S. 1041 (2004).

[6] Because the Second Circuit affirmed by incorporating the district court's opinion *in toto, Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), citations here will be to the district court opinion.

promotions on qualifications and merit, had been administered to identify candidates for promotion to several open positions for Lieutenant and Captain in the New Haven Fire Department in accordance with the City Charter's "Rule of Three" under which positions are filled from among the three individuals with the highest scores on the exam. The City did not fill the open positions for Lieutenant and Captain because the exam results did not produce the City's desired quotas of minorities to compete for promotion.[7]

The decision to void the test and make no promotions is blatant race-based decision-making, which is designed to achieve racial balance in the fire department. The City desires racially proportional results from the test, not simply equality of opportunity for minority applicants. Such race-based governmental decision-making violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The City claims there is no violation of the Equal Protection Clause because the test was administered and scored in an identical fashion for all applicants, promoted no one, and thus failed to create a racial classification.[8] But this argument completely ignores the City's racially discriminatory treatment of the

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[7] *Ricci v. DeStefano*, 554 F.Supp.2d 142, 145-151 (D.Conn. 2006).

[8] *Id.* at 161-62.

exam results of those who took and passed it. The decision not to fill the positions because the exams failed to produce a certain racial quota. The Second Circuit below agreed with the City's position.[9] Consequently, neither court engaged in any constitutional scrutiny whatsoever.

Amicus submits that City's decision to disregard the test results and not fill the open positions is a race-based decision designed to achieve racial balancing in the fire department, is subject to strict scrutiny, and violates the Equal Protection Clause of the Fourteenth Amendment.

II. THE DECISION NOT TO FILL THE POSITIONS IS RACE-BASED DECISION-MAKING.

A. Race-Based Decision-Making Is Illegal, Immoral, And Destructive Of Democratic Society.

Equal protection of the laws as embodied in the Constitution is founded on the principle that "distinctions between citizens solely because of their [race or] ancestry are by their vary nature odious to a free people whose institutions are founded upon the doctrine of equality."[10] "'[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently

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[9] *Id.*

[10] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

wrong, and destructive of democratic society.'"[11] Without a doubt, "classifications based on race carry a danger of stigmatic harm."[12] Indeed, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[13] What's more, "there is a danger that racial classification is merely the product of unthinking stereotypes or a form of racial politics."[14] In fact, "r[a]cial classifications . . . seldom provide a relevant basis for disparate treatment" and are "potentially . . . harmful to the entire body politic. . . ."[15] Accordingly, "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause."[16]

Furthermore, these same considerations apply irrespective of which racial group benefits and which is burdened:

> [a]ll governmental action based on race – a *group* classification long recognized as "in most circumstances irrelevant and therefore, prohibited" – should be subjected to detailed judicial inquiry to ensure that the *personal*

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[11] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting A. Bickel, *The Morality of Consent* 133 (1975)).

[12] *Croson*, 488 U.S. at 493.

[13] *Id.*

[14] *Id.* at 509.

[15] *Id.* at 505.

[16] *Id.* at 518 (Kennedy, J., concurring).

> right to equal protection of the laws has not been infringed.[17]

Indeed, "under our Constitution, there can be no such thing as either a creditor or a debtor race . . . [a] concept [that] is alien to the Constitution's focus on the individual."[18] Therefore, "[i]n the eyes of government, we are just one race here [–] American."[19] Consequently, there is no "racial paternalism exception to the principal of equal protection."[20] Indeed, "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[21] Consequently, "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[22]

B. Race-Based Decision-Making Requires Strict, Skeptical Judicial Scrutiny.

"A racial classification, regardless of purported motivation, is presumptively invalid and may be

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[17] *Adarand Constructors, Inc.* 515 U.S. at 227 (emphasis in original) (quoting *Hirabayashi*, 320 U.S. at 100).

[18] *Id.* at 239 (Scalia, J., concurring).

[19] *Id.*

[20] *Id*. at 240 (Thomas, J., concurring).

[21] *Id.*

[22] *Id.* at 241 (Thomas, J., concurring).

upheld only upon an extraordinary justification."[23] Consequently, race-based decision-making is "subject to the most exacting judicial scrutiny [and] it is the government's burden to satisfy the demands of the extraordinary justification."[24] Therefore, courts must subject any justification for a race-based decision to a "most searching examination" and with "skepticism."[25]

C. Determining Whether A Decision Is Race Based Also Requires Strict, Skeptical Judicial Scrutiny.

It is self evident that determining whether the City's decision is race based or race neutral is critical to applying strict scrutiny to that decision. Because "any preference based on racial or ethnic criteria

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[23] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). *Accord U.S. v. Virginia*, 518 U.S. 515, 532 (1996).

[24] *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).

[25] *Adarand*, 515 U.S. at 223, 237. *Accord Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("[T]he state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action is necessary."); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.")

must necessarily receive a most searching examination,"[26] courts must be no less scrupulous in determining whether raced-based decision-making is behind any particular governmental action. For a court to give strict scrutiny to a race-based governmental decision, it must engage in the same scrutiny to determine whether such a decision is race based, applying the same burden of proof to government. To do less would eviscerate the Equal Protection Clause. History has shown that those who wish to discriminate can be extremely creative, even ingenious, in disguising their racial motives in facially race-neutral facades, the proverbial "wolf in sheep's clothing." [27] A court must be sure that what may appear on its face to be race-neutral is not, in fact, the product of racial politics, whether characterized as "benign" or "discriminatory":

> Absent searching judicial inquiry into the justification . . . there is simply no way of determining what . . . classifications [or decisions] are in fact motivated by . . . simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is

[26] *Adarand*, 515 U.S. at 223.

[27] *See*, *e.g., State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (describing the ingenious machinations in certain portion of our country to prevent African-Americans from voting).

pursuing a goal important enough to warrant use of a highly suspect tool.[28]

D. The Decision Not To Fill The Positions Is Race Based.

1. The only reasons the City did not fill the positions is overtly race based.

The City claims that it did not fill the positions because the exam resulted in disparate impact against minority firefighters.[29] That is, not enough minority firefighters passed the exam to qualify them to compete under the "Rule of Three" for promotions. According to the City, this result occurs whenever the exam results do not satisfy the EEOC's "four fifths rule."[30] Under this rule, there is potentially actionable disparate impact when the percentage of minority candidates passing an exam is less then 80 percent of the percentage of the passing rates for non-minority candidates.

Thus, what the City really argues is that whenever the "four fifths rule" is not achieved by passing minorities, the City may, without consequence, throw out the exams and deny opportunity for promotion to all applicants. Under this theory, the City may continue to nullify the exams until such time as the

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[28] *Croson*, 488 U.S. at 493.

[29] *Ricci*, 544 F.Supp. at 162.

[30] *Id.* at 158. This rule is found at 29 C.F.R. § 1607.4(D).

City's racial quotas are achieved in some future exam. This is no more than racial balancing practiced through inaction.

The result of this practice is that non-minority firefighters may not compete on an equal footing for promotion with minority firefighters, who are given innumerable chances to exceed their non-minority counterparts' scores. Thus, the deck is unconstitutionally stacked against the non-minority firefighters. The constitutional injury is not whether an individual was denied promotion, but whether an individual was deprived of the ability to compete on an equal footing for a promotion from the beginning:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.[31]

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[31] *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666 (1993); *Adarand*, 515 U.S. at 211 ("Adarand need not demonstrate that it has been, or will be, the low bidder. . . . The injury . . . is that a discriminatory classification prevent[s] the

(Continued on following page)

The decision not to act on the promotions in the fashion here is just as race based as a decision to promote minority firefighters over the non-minorities who had higher scores.

This is illustrated by a hypothetical analogy. Assume that New Haven has a policy that a given percentage of minority contractors should bid on all public construction projects and it has prequalification requirements for all bidders on city construction projects, as do many cities. Prequalification is designed to assure that only contractors who are qualified and able to perform bid the project. Also, assume the City publishes notice for bids and prequalification for the construction of a bridge, and that, after prequalification, the City determines the desired percentage of minority contractors do not qualify to bid. Assume finally that the City thereupon cancels the project so that it may rebid the project at another time, hoping more minority contractors will become prequalified so that they may bid.

No one would credibly argue that this is a race based decision or that non-minority contractors who did prequalify are not at a competitive disadvantage to minority contractors who will have other opportunities to qualify. There can be little doubt that the same is true here, when the City rejected the results of the firefighters' promotional exam.

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plaintiff from competing on an equal footing." (citing *Jacksonville*, 508 U.S. at 667)).

2. The Second Circuit's own findings establish that racial balancing for political reasons was the motivation of the City.

As explained, the Second Circuit summarily found that equal protection jurisprudence did not apply because there was no race-based decision making. This holding, however, contradicts the district court's own findings that race was the predominant motivation to discard the exam results and not promote anyone:

> [The City] acted on the basis of the following concerns:
>
> [1] the test had a statistically *adverse impact on African American and Hispanic examinees;*
>
> [2] promoting off of this list would undermine their *goal of diversity* in the Fire Department and would fail to develop managerial *role models for aspiring [minority] firefighters*;
>
> [3] it would subject the City to *public criticism*; and
>
> [4] would likely subject the City to Title VII lawsuits from minority applicants that *for political reasons* the City did not want to defend.[32]

[32] *Ricci*, 554 F.Supp.2d at 162 (emphasis added).

The first factor, adverse impact, is based solely on the failure of the test to achieve desired racial balancing, as is achieving work force diversity. Moreover, the desire to create racial role models was emphatically rejected by this Court in *Wygant*.[33] Finally, that the City feared public criticism for promoting too few minority firefighters, irrespective of the reason therefor and did not believe it politically expedient to defend a lawsuit, constitutes the very racial politics so forcefully rejected by *Croson*.[34]

To cap it all off, the Second Circuit found that "[a] jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted. . . ."[35] Those courts even concluded that the "City's reasons for advocating non-certification were related to the racial distribution of the results."[36] In spite of these clear findings of racially discriminatory intent, the Second Circuit ignored those findings, and concluded that these considerations do not constitute an "intent to discriminate against non-minority applicants."[37] Indeed,

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[33] *Wygant*, 476 U.S. 267 (termination of non-minority teachers in order to preserve minority role models for minority students constitutionally impermissible).

[34] *Croson*, 488 U.S. at 509.

[35] *Ricci*, 554 F.Supp.2d at 152.

[36] *Id.*

[37] *Id.* at 162.

these courts even stated, "none of defendants' motives could suggest . . . that defendants acted 'because of' animus against non-minority firefighters."[38]

This contradiction can only be explained if the Second Circuit adopted a concept that *Adarand* categorically rejected: only an intent to injure a racial group violates the Equal Protection Clause; discrimination intended to benefit a racial group does not.[39] The Second Circuit is wrong:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision-making

[38] *Id.*

[39] *Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must by analyzed by a reviewing court under strict scrutiny.")

> such irrelevant factors as a human being's race' will never be achieved."[40]

Thus, the Second Circuit's decision is contrary to long-established precedent of this Court.

III. THE CITY'S RACE-BASED TREATMENT OF THE EXAM RESULTS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Governments may justify the use of racially discriminatory preferences only to remedy "extreme" cases of "systematic" patterns of deliberate racial discrimination where such remedies are necessary to "break down patterns of deliberate exclusion."[41] "The only cases found to present the necessary 'compelling interest' sufficient to 'justify a narrowly tailored race-based remedy' are those that expose . . . 'pervasive, systematic, and obstinate discriminatory conduct.' "[42] Even then, racial remedies may be used only as a matter of "last resort,"[43] because such remedies are "the strongest of medicines" "reserved for those severe

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[40] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2757-58 (2007) (internal citations omitted).

[41] *Croson*, 488 U.S. at 469, 509.

[42] *Associated General Contractors of Ohio*, 214 F.3d at 737 (quoting *Adarand*, 515 U.S. at 237).

[43] *Croson*, 488 U.S. at 519 (Kenney, J., concurring); *Contractor's Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 893 F.Supp. 419, 424 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3rd Cir. 1996).

cases that are highly resistant to conventional treatment."[44] Racial preferences are appropriate only as "a remedy for intentional discrimination committed by the public entity according preferential treatment."[45]

The speculation that the City might be sued for disparate impact under Title VII[46] is no more than a "red herring" the City puts forward to justify its race-based decision.[47] There is no law to support the proposition that the City's speculative fear that it might be sued under Title VII disparate impact theories constitutes a compelling interest, justifying racial balancing. A fear of suit under Title VII's disparate impact rules may not serve as a compelling interest for a public employer, because intentional discrimination is not involved. Disparate impact alone, which is the case here, does not provide a public employer with a compelling interest.[48]

Significantly, there is no contention here that the exam was intentionally discriminatory, or that past discrimination by the City had produced the lower test scores. Nor was there any viable contention that the exam was not job-related. In fact, the City paid a

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[44] *Engineering Contractors of South Florida v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997).

[45] *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir. 2001).

[46] Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e, *et seq.*

[47] *Ricci*, 554 F.Supp. at 151.

[48] *Washington v. Davis*, 426 U.S. 229 (1976).

great deal of money to an independent firm to develop a job-related, non-biased test.[49] Additionally, the non-minority firefighters argued that the disparate results of the exam were due not to any defects in the exam, but instead to historical political patronage and racial balancing in the City's promotional policies.[50]

CONCLUSION

The City of New Haven engaged in unconstitutional, racially discriminatory treatment of test results, thereby denying non-minority firefighters the opportunity to compete for promotion with minority firefighters on an equal footing. Its decision to scrap the test results is based entirely on the test's failure to produce desired racially balanced results, which would result in political backlash for city officials if they made promotional decisions based on such results. Accordingly, this Court should reverse the decision of the Second Circuit Court of Appeals, declaring that the race-based decisions of the City of New Haven and its Civil Service Board violate the

[49] *Ricci*, 554 F.Supp.2d at 145, 147-48.

[50] *Id.* at 150.

Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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